IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 237 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME-TAX

Versus

KALINDI INVESTMENT PVT. LTD.

Appearance:

MR BB NAIK for MR MANISH R BHATT for Petitioner

MR RK PATEL for Respondent No. 1

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE D.A.MEHTA

Date of decision: 11/06/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE A.R.DAVE)

The following two questions have been referred to this Court for its opinion by the Income Tax Appellate Tribunal, Ahmedabad Bench 'A', under the provisions of sec. 256(2) of the Income-tax Act, 1961.

1. "Whether, on the facts and in the circumstances of the case, no question of assessing profits u/s 41(2) of the Income-tax Act, 1961 in the hands of a holding company arises in case of sale by a holding company as a going concern to its 100% subsidiary company?

2. Whether, on the facts and in the circumstances of the case, the AAC was right in setting aside the assessment and requiring the ITO to reframe the assessment?"

2. We have heard learned advocate Shri B.B. Naik appearing for the applicant-department and learned advocate Shri R.K. Patel appearing for the respondent-assessee.

3. It has been very fairly submitted by the learned advocates that the questions, which have been referred to this court, have already been answered in I.T.R. No. 243/85 by this court. Upon perusal of the said ITR, which has been decided by this court on 8.3.2001, we find that question No. 1, which has been referred to this court, has been answered in the negative to a limited extent i.e in favour of the revenue and against the assessee whereas question No. 2 has been answered in the affirmative i.e. in favour of the revenue and against the assessee. Paragraphs 20 and 21 of the said judgment, which are relevant for our purpose, are reproduced hereinbelow :

"20. Before concluding, we must note that even while not accepting the major arguments urged on behalf of the assessee, there is some substance in the contention of Mr. R.K. Patel for the assessee that the provisions of section 41(2) govern only building, machinery, plant or furniture and that, therefore, other assets cannot be included within the scope of section 41(2) for taxing the difference between thew written down value and the actual cost. We also find that in view of the provisions of section 47 of the Act, transfer will not attract the provisions of section 45 relating to capital gains if the transfer of capital assets is by a company to its wholly owned subsidiary company and the holding company as well as the subsidiary company are Indian companies.

21. In view of the above discussion, our answer to question No. 1 is in the negative to the above extent i.e. in favour of the revenue and against the assessee. Our answer to question No. 2 is in the affirmative to the above extent i.e. in favour of the revenue and against the assessee."

4. In view of the decision referred to hereinabove and as the questions, which have been referred to this court have been finally concluded, we answer question No. 1 in the negative to the extent mentioned hereinabove i.e. in favour of the revenue and against the assessee whereas our answer to question No. 2 is in the affirmative to the limited extent as stated hereinabove i.e. in favour of the revenue and against the assessee.

The reference stands disposed of accordingly with no order as to costs.

(A.R. Dave, J.)

(D.A. Mehta, J.)